Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 88–1133

IN THE

Supreme Court of the United States

October Term, 1988

NIELS H. OSTER, M.D.,

Petitioner,

v.

OTIS R. BOWEN, M.D., SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES;

RICHARD P. KUSSEROW, INSPECTOR GENERAL, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; AND

MEDICAL SOCIETY OF VIRGINIA REVIEW ORGANIZATION,

Respondents.

RESPONDENT MEDICAL SOCIETY OF VIRGINIA REVIEW ORGANIZATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FOURTH CIRCUIT

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February 8, 1989

Questions Presented For Review

1. Did the Fourth Circuit properly dismiss Dr. Oster's appeal for lack of jurisdiction since Dr. Oster (a) noted the appeal beyond the 60-day appeal period established by Fed. R. App. P. 4(a)(1) and (b) failed to move for an extension of time within the additional 30-day period provided by Fed. R. App. P. 4(a)(5)?
2. Did the District Court properly deny an award of attorneys' fees because the Equal Access to Justice Act, (EAJA), 28 U.S.C. §2412, does not apply to the Medical Society of Virginia Review Organization, a private entity that contracts with the government pursuant to a federal program?
3. Did the District Court correctly rule that EAJA did not apply because the federal defendants' and MSVRO's position was "substantially justified"?
4. Did the District Court properly find that Dr. Oster was not entitled to attorneys' fees under the common benefit exception to the common law since Dr. Oster failed to establish an award would spread the cost of the benefit to a class of beneficiaries?
5. Did the District Court properly deny an award of attorneys' fees against MSVRO under the bad faith exception to the common law since Dr. Oster failed to demonstrate bad faith on the part of MSVRO?

All questions should be answered affirmatively, and the petition should be denied.

Parties to the Proceeding
(Rule 28.1)

Medical Society of Virginia Review Organization (MSVRO) is a private, non-profit, Virginia non-stock corporation, governed by a Board of Directors consisting of certain *ex officio* directors who are officers of the Medical Society of Virginia and other private citizens appointed by the President of the Medical Society of Virginia.

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I. OPINIONS AND JUDGMENTS BELOW

This litigation arises out of an action filed in the United States District Court for the Eastern District of Virginia (District Court) by Dr. Niels Oster (Dr. Oster) for declaratory and injunctive relief concerning the sanctioning process for Medicare Program providers and physicians. After the trial began, it was continued on the Court's motion. During the continuance, the Secretary and the Inspector General of the United States Department of Health and Human Services (collectively, the federal defendants) promulgated changes in some of the sanction procedures that were the subject of Dr. Oster's action. Dr. Oster then filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 41(a)(2), and the action was dismissed without prejudice on October 20, 1987. Thereafter, Dr. Oster moved for an award of attorneys' fees and costs pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412, and the common law.

The District Court denied Dr. Oster's Motion for attorneys' fees on January 13, 1988. This decision is reported at *Oster* v. *Bowen, et al.*, 682 F. Supp. 853 (E.D. Va. 1988). (Copies of the Order and Memorandum Opinion are attached at Petitioner's Appendixes C-1 through C-19.)

By letter dated March 14, 1988, Dr. Oster requested the District Court to "review the decision entered on January 13, 1988," to rescind that portion of the decision which disallowed the claim for court costs and attorneys' fees, and further requested the decision be reviewed on appeal. The Clerk received, and filed, the Notice on March 15, 1988. (This Notice is attached at Respondent's Appendix A-1). The case proceeded on appeal to the United States Court of Appeals for the Fourth Circuit, docketed as No. 88-2065. On September 15, 1988, the Fourth Circuit denied Dr. Oster's appeal as

being untimely filed. (A copy of the opinion is attached at Petitioner's Appendixes A-1 through A-3).

On June 7, 1988, the District Court denied Dr. Oster's "motion for reconsideration." (A copy of this Order is attached at Petitioner's Appendixes B-1 through B-2). Dr. Oster appealed the denial of the "motion for reconsideration" to the Fourth Circuit. That appeal, docketed as No. 88-2126, is still pending.

II. STATUTES AND REGULATIONS INVOLVED

The Equal Access to Justice Act (EAJA), 28 U.S.C. §2412(b), provides:

> (b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

Title 28 U.S.C. §2412(d)(1)(A) of EAJA also states:

> (d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceed-

> ings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds the position of the United States was substantially justified or that special circumstances make an award unjust.

Medicare regulations at 42 C.F.R. §476.133(a)(2)(i) provide:

> (2) Disclosure to others. [i] A PRO must disclose to an institution, upon request, information on a practitioner to the extent that the information displays practice or performance patterns of the practitioner in that institution.

III. STATEMENT OF THE CASE

Dr. Oster filed an action in the United States District Court, Eastern District of Virginia, against the federal defendants and MSVRO, seeking declaratory and injunctive relief concerning procedures used by peer review organizations (PROs) to sanction physicians participating in the Medicare Program. MSVRO is the PRO responsible for reviewing Dr. Oster's activities under the Medicare Program. Dr. Oster claimed that procedures promulgated by the federal defendants and used by MSVRO violated his rights of due process and equal protection.

Utilizing generic screening criteria, a medical reviewer for MSVRO first identified a patient's medical record for further review because the record suggested that Dr. Oster may have provided substandard medical treatment. After several levels of review, including an analysis of patient records and input from Dr. Oster, MSVRO sent Dr. Oster a "30-day notice," for possible gross and flagrant violations of his Medicare obligations. A meeting was scheduled but postponed when Dr. Oster

filed suit. The District Court entered a temporary restraining order, and the parties agreed to certain procedural changes for the postponed meeting.

The meeting was held on September 10, 1986, and MSVRO found that Dr. Oster had substantially violated his obligation to render services of a quality that meets professionally recognized standards of health care in a substantial number of cases. The MSVRO further recommended that, instead of a sanction recommendation to the Office of Inspector General (OIG), Dr. Oster accept a corrective action plan. Although the parties agreed to an acceptable corrective action plan, Dr. Oster refused to dismiss the lawsuit against MSVRO because of the federal defendants' refusal to guarantee that any PRO successor to MSVRO would conduct future meetings in the manner conducted on September 10, 1986. Accordingly, the trial began on April 21, 1987, but was continued.

Before the trial could conclude, the federal defendants promulgated Transmittal No. 15 to the PRO Manual, effective May 13, 1987, which effected changes in the sanction process, including some procedures that were the subject of Dr. Oster's action. Dr. Oster then filed a Motion to Dismiss the action pursuant to Fed. R. Civ. P. 41(a)(2). The case was dismissed without prejudice on October 20, 1987.

Thereafter, Dr. Oster moved for an award of attorneys' fees and costs under EAJA, 28 U.S.C. §2412. By Order and Memorandum dated January 13, 1988, the District Court denied the Motion.

By letter dated March 14, 1988 to the District Court, Dr. Oster requested the Court, "to review the decision entered on January 13, 1988," and "to rescind that portion of the decision which disallowed" Dr. Oster's claim for court costs and attorneys' fees. Dr. Oster

further requested "the decision in the District Court be reviewed on appeal." (Respondent's Appendix A-1) This letter was received, and filed, by the Clerk of the United States District Court, on March 15, 1988, 61 days after the January 13, 1988 Order. The Fourth Circuit treated this as a Notice of Appeal, and docketed the case as No. 88-2065.

The federal defendants and MSVRO filed motions to dismiss the appeal as being untimely.[1] The Fourth Circuit dismissed the appeal on September 15, 1988.

On June 7, 1988, the District Court also issued an order denying Dr. Oster's "motion for reconsideration," *e.g.*, the March 14, 1988 letter to the District Court. Dr. Oster's appeal from the June 7, 1988 Order is still pending before the Fourth Circuit, docketed as No. 88-2126.

IV. SUMMARY OF ARGUMENT

The writ should be denied because Dr. Oster failed to notice his appeal of the District Court's January 13, 1988 order in the time mandated by Fed. R. App. P. 4(a)(1). Dr. Oster also failed to move for an extension of time within the 30-day period provided by Fed. R. App. P. 4(a)(5).

Moreover, this case is still on appeal. Dr. Oster has demonstrated no public importance that justified deviation from normal appellate procedure. Furthermore, Dr. Oster's appeal is without merit. EAJA does not apply to private contractors, such as MSVRO, who contract with government agencies. The position of the federal defendants and MSVRO was also substantially

[1] In his petition, Dr. Oster misstated the reason for the dismissal as "Due to a misconception of filing time, his informal brief arrived one day late. . . ." Petitioner's Brief, pp. 7-8.

justified. Finally, there is no common law basis upon which to award attorneys' fees.

V. REASONS FOR DENYING THE WRIT

A. Dr. Oster's Appeal To The Fourth Circuit Was Untimely.

Dr. Oster noted his appeal from the District Court's January 13, 1988 Order beyond the 60-day appeal period established by Fed. R. App. P. 4(a)(1) for cases in which an officer of the United States is a party. He also failed to move for an extension of the appeal period within the additional 30-day period provided by Fed. R. App. P. 4(a)(5). Time periods established by Fed. R. App. P. 4 are "mandatory and jurisdictional," *Browder* v. *Dep't of Corrections*, 434 U.S. 257, 264 (1978), and Dr. Oster's failure to note a timely appeal or to obtain an extension of the appeal period deprived the appellate court of jurisdiction. See *Shah* v. *Hutto*, 722 F.2d 1167 (4th Cir. 1983), *cert denied*, 466 U.S. 975 (1984).

The 60th day following January 13, 1988 fell on Sunday, March 13, 1988. The date for filing was thereby extended until Monday, March 14, 1988. *See* Fed. R. App. P. 26(a). Dr. Oster's letter was received and filed by the Clerk of the District Court on March 15, 1988. (Respondent's Appendix A-1) Accordingly, the Fourth Circuit properly dismissed the appeal.

B. This Case Is Still On Appeal And No Imperative Public Importance Justifies Deviation From Normal Appellate Procedure.

MSVRO sets forth in its Statement of the Case what Dr. Oster neglects to state in his: the issue of the denial of an attorneys' fees award is still pending before the Fourth Circuit. Before this Court should consider an

issue not finally resolved below, Dr. Oster must demonstrate the issue is of such imperative public importance as to justify both deviation from normal appellate practice and immediate settlement by this Court. *See* Sup. Ct. R. 18.

Notwithstanding Sup. Ct. R. 18 or 21.1(j), Dr. Oster has made no effort whatsoever to establish the imperative public importance of this case.

C. EAJA Does Not Apply To MSVRO, Because It Is Not The United States, A Federal Agency, Or A Federal Official.

EAJA plainly states that it applies only to the United States, a federal agency, or a federal official acting in his or her official capacity. 28 U.S.C. §2412(b). As the District Court correctly held, EAJA does not provide for an award against a private entity, such as MSVRO, that contracts with the government pursuant to a federal program.

Although there is no definition of a "federal agency" in EAJA, the concept has been addressed in case law arising from the Federal Tort Claims Act and Freedom of Information Act. In *United States* v. *Orleans*, 425 U.S. 807, 819 (1976), for example, this Court ruled that a community action agency funded under the Economic Opportunity Act of 1964 was not a federal instrumentality or agency for purposes of Federal Tort Claims Act liability. This Court concluded the contractor was not a federal agency because "a critical element in distinguishing an agency from a contractor is the power of the federal government 'to control the detailed physical performance of the contractor.' " 425 U.S. at 814. *See Logue* v. *United States*, 412 U.S. 521, 528 (1973). Simply put, MSVRO's day-to-day operations are not supervised by the federal government. *See also, Public Citizen Health Research Group* v. *Department of Health, Edu-*

cation and Welfare, 668 F.2d 537 (D.C. Cir. 1981) (a PSRO, the PRO's predecessor, was not an agency for purposes of the Freedom of Information Act.) Therefore, EAJA does not apply to MSVRO.

D. The District Court Correctly Held That EAJA Could Not Be Applied Against MSVRO, Because The Position Of The Federal Defendants And MSVRO Was Substantially Justified.

MSVRO disputes that Dr. Oster prevailed in the litigation or that the District Court had jurisdiction. In addition, neither MSVRO nor the federal defendants would be liable for attorneys' fees under the common law. More important, however, the District Court was correct in determining that the position of both MSVRO and the federal defendants was substantially justified.

As noted below, the reasonableness of defendants' position was demonstrated by the Fourth Circuit's decision in *Varandani* v. *Bowen*, 824 F.2d 307 (4th Cir. 1987). The District Court observed that the Fourth Circuit held under "a remarkably similar fact pattern":

> that a colorable procedural due process claim sufficient to establish jurisdiction prior to exhaustion of administrative remedies was not made out where the physician received notice of the impending suspension, had an opportunity to respond in writing, and had an opportunity to respond in person at an informal hearing.

682 F. Supp. at 856. Since the Fourth Circuit had held that a physician is entitled to neither an evidentiary hearing nor a full adversary proceeding before being suspended from participation in Medicare, the federal defendants and MSVRO had a reasonable basis for the

legal theories underlying their conduct, and their position was substantially justified under EAJA.[2]

E. Dr. Oster Cannot Recover Attorneys' Fees Under The Common Law.

The District Court properly denied attorneys' fees because an award of fees against the federal defendants and against MSVRO was not available under common law. *See* 28 U.S.C. §2412(b).

Under the traditional "American Rule," a litigant is not entitled to reimbursement for attorneys' fees and costs absent the applicability of an exception to this Rule. The District Court held that the criteria under the common benefit exception enunciated in *Mills* v. *Electric Auto-Life Co.*, 396 U.S. 375 (1970), were not met because there is no financial relationship between the MSVRO, a nonstock corporation, and the physicians who might benefit from the new government procedures. Therefore, an attorneys' fee award would not serve to spread the cost of achieving these benefits among the physician-beneficiaries.

In addition, Dr. Oster was not entitled to an award of attorneys' fees pursuant to the bad faith exception to the American Rule. Although Dr. Oster claimed the MSVRO acted in bad faith by providing information to the Board of Medicine and to Tidewater Memorial Hospital, the District Court properly ruled that Dr. Oster had not demonstrated bad faith on the part of MSVRO.

First, the MSVRO notified Tidewater Memorial Hospital of the issuance of a 30-day notice letter upon request by the hospital and in compliance with federal regulations. As

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[2] Of course, defendants are entitled to rely upon the Fourth Circuit's opinion in *Varandani* v. *Bowen*, 824 F.2d 307 (4th Cir. 1987), regardless of any subsequent settlement of Dr. Varandani's claim.

reflected in the record, Tidewater Memorial Hospital had previously requested MSVRO to notify the hospital of any concerns relating to the quality of care by doctors practicing at the hospital (Vaughan Affidavit, Exhibit 7). Therefore, pursuant to applicable federal law, MSVRO had an affirmative duty to disclose its concerns to the hospital. *See* 42 C.F.R. §476.133(a)(2)(i).[3]

Second, although a doctor's right of privacy is counterbalanced against the need to protect Medicare beneficiaries, disclosure of information to other authorities may be precluded by the confidentiality provisions of the federal regulations. When Dr. Oster filed his action in the District Court, this information became public information and MSVRO's duty to report its concerns to the Virginia State Board of Medicine became clear. MSVRO only provided the Virginia State Board of Medicine a copy of the papers that Dr. Oster had filed in the District Court. Stated somewhat differently, MSVRO complied with its obligations to the public and to the Medicare beneficiaries by providing information to a state agency when it had reason to believe there may be substantial risk to public health.

Dr. Oster would claim that the review process itself was a manifestation of bad faith. The constitutionality of the review process was not at issue, once the case was dismissed. Moreover, MSVRO was substantially justified in relying upon federally mandated procedures. *See Varandani* v. *Bowen*, 824 F.2d 307 (4th Cir. 1987).[4]

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[3] Section 476.133(a)(2)(i) provides a PRO must disclose to an institution, upon request, information on a practitioner to the extent that the information displays practice or performance patterns of the practitioner in that institution.

[4] Dr. Oster also claims MSVRO tried to "use subterfuge to obtain privileged information in this case," and attached a letter from his attorneys to an attorney for the MSVRO. First, this correspondence is not a matter of record. Secondly, Dr. Oster fails to provide a copy of MSVRO's response which clarified the misun-

VI. CONCLUSION

The Fourth Circuit dismissed the appeal because it was untimely. Moreover, Dr. Oster has failed to demonstrate that the District Court's denial of an award of attorneys' fees was in error. Therefore, the writ should be denied.

Respectfully submitted,

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derstanding, rebutting the "subterfuge" claim. Third, the information requested was public, not privileged, information from the State of Virginia's Department of Medical Assistance Services regarding the Medicaid procedures and process. Thus, the information requested had nothing to do with Dr. Oster, individually.

Stamped: Received March 15, 1988
Clerk, U.S. District Court
Richmond, VA

Stamped: Filed March 15, 1988
D/JT!
Clerk, U.S. District Court
Richmond, VA

March 14, 1988

To the Judge of the United States District Court
Eastern District of Virginia
Richmond Division
P. O. Box 2-AD
Richmond, VA 23205

Re: Civil Action #86-0344-R

Dear Sir:

The undersigned Plaintiff in the above styled action respectfully requests the Court to review the decision entered on January 13, 1988, and to rescind that portion of the decision which disallowed the Plaintiff's claim for court costs and attorney's fees.

The plaintiff further requests that the decision in the District Court be reviewed on appeal.

/s/ Niels H. Oster, M.D. 3/14/88

Niels H. Oster, M.D.